

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

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Notice of Proposed Rulemaking  
Establishing Rules Pursuant to 39 U.S.C. 404a

Docket No. RM2013-4

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**Joint Reply Comments of  
Stamps.com and Endicia**

August 28, 2013

Stamps.com Inc. and Endicia, providers of PC Postage and related products and services, submit these joint reply comments pursuant to PRC Order No. 1739, "Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a" (June 5, 2013).

Overall, the majority of commenters agree that: (1) Postal Service violations of 404a can have severely harmful consequences for private industry, the public, and even the Postal Service itself; (2) the PRC is empowered to hear, and should have procedures governing, complaints alleging such violations; (3) the PRC's proposed rules are generally acceptable, with various constructive suggestions; and (4) the establishment of an Accelerated Procedures option is sensible and commendable. One commenter fears that the PRC is not up to the task of policing 404a violations and would have such actions proceed in federal court. The principal commenter against establishment of the new rules is the only entity that could be a violator of 39 U.S.C.

404a, and hence the only entity that would have to defend against actions brought under the new procedures. It is no surprise when the fox objects to protections for the henhouse.

We reply specifically to selected comments:

### **Pitney Bowes' Comments**

Pitney Bowes, which is generally supportive of the proposed rules, makes a recommendation concerning proposed Rule 3032.5 we also support. Pitney Bowes points out a complainant alleging a violation of 404a(a)(1) “should be able to state a *prima facie* case merely by showing that the Postal Service has established a rule or regulation that establishes the terms of competition.” [Pitney Bowes Comments, pp. 2-3.] Once a complainant has presented a *prima facie* case, it should then be up to the Postal Service to demonstrate why the regulation should be allowed to stand. The burden should not be on the complainant to do more. For the reasons cited by Pitney Bowes in its comments, we agree with this point and urge the PRC to revise this proposed rule accordingly.

We also agree with Pitney Bowes' suggestion that the proposed rules implementing 404a(a)(1) would be improved by including additional guidance on actions that would be deemed *per se* violations. [Pitney Bowes Comments, p. 5.] Pitney Bowes provides several examples of the type actions that would give rise to a *per se* violation. Providing such guidance in the rules could forestall such actions, avoiding the time and expense of future litigation.

## Postal Service Comments

The Postal Service complains the proposed definition of “rule, regulation, or standard” does not comport with “similar terminology” the Postal Service has used in other regulations.<sup>1</sup> [USPS Comments, p. 6.] The “similar terminology” the Postal Service points to is not similar at all – it is merely a list the agency has put together of the “regulations of the United States Postal Service.” Congress purposely set out a more expansive field for potential 404a violations than the agency’s establishment of an anti-competitive regulation – much less only an anti-competitive regulation it officially acknowledges in 39 CFR 211.2. As noted in our initial comments, the Postal Service has gone to great lengths to disown some of its *de facto* regulations, such as its 600+ page purchasing rules that it outwardly contends are merely non-binding guidelines. [See Joint Comments of Stamps.com and Endicia, p. 4.] The Postal Service’s effort to limit the proposed definition demonstrates the importance of not allowing the room to play semantic games. The PRC is thus right not to limit the definition of “rule, regulation, or standard” to regulations only, as this would ignore two-thirds of the specific terms used by Congress in 404a.

We also disagree with the Postal Service’s objection to the proposed rule that “the Postal Service may not base any statutory affirmative defenses to alleged violations of 39 U.S.C. 404a(a) on the powers enumerated in 39 U.S.C. 401 and 404.” [USPS comments, p. 15.] Allowing the Postal Service to defeat a 404a complaint by contending it is merely exercising a specific power in one of these sections would

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<sup>1</sup> Notably, the Postal Service does not contend that the PRC’s definition is inconsistent with any similar terminology used by the PRC or in its rules and regulations.

swallow up 404a, making it surplusage. Indeed, it is hard to imagine a potential 404a(a) violation that couldn't be defended on the basis that the Postal Service has merely taken an action enumerated in those sections. It is alarming that the Postal Service even raises this objection, as it demonstrates a desire to make 404a meaningless. The PRC must hold firm here and not give the agency hope that it may defend against 404a violations on the basis of other enumerated powers.

We also disagree with the Postal Service's objection to the Commission's proposed Rule 3032.7(c), concerning the availability of consent as an affirmative defense to an alleged 404a(a)(3) violation. The Postal Service apparently objects to the proposed rule's requirement that such consent must be "informed, uncoerced, and given only after the Postal Service has communicated adequate information and explanation about the risks of providing such consent." [Postal Service Comments, p. 20-21.] The Postal Service does not state what part of this requirement is objectionable and we cannot find anything that would be. Neither does the Postal Service offer any alternative language. Yet the Postal Service contends that these consent obligations would somehow "interfere with the Postal Service's ability to conduct business." [Id. at p. 21.] The only interference that would come from this rule would be interference with the Postal Service's ability to rely on coercive consent as an affirmative defense – and that is as it should be.

### **Public Representative's Comments**

We agree with the Public Representative that, for alleged 404a(a)(1) violations, the Postal Service's showing that a rule, regulation, or standard does not create an

unfair competitive advantage should be a rebuttable defense rather than an affirmative defense. [Public Representative's Comments, pp. 5, 8.] As noted by the Public Representative, treating this as an affirmative defense could deprive the complainant of the opportunity to rebut the Postal Service's assertion. We therefore agree the Commission should amend proposed Rule 3032.5(b) to make this a rebuttable defense. We also agree a new subsection should be added that allows the complainant to overcome this defense by showing the competitive harm caused by the action outweighs the regulatory benefit.

We also agree with the Public Representative that the PRC should permit complainants to bring "dormant" 404a(a)(1) claims, where the Postal Service's entry into a competitive market has, by itself, the effect of precluding or establishing the terms of competition. [Public Representative's Comments, pp. 5, 10.] As the Public Representative points out, if the Postal Service enters a market that it also regulates, existing regulations could have the effect of precluding or establishing the terms of competition. [Id. at p. 10.] No additional establishment of a rule, regulation, or standard should need to be alleged, particularly if the Postal Service does not subject itself to the same regulations as those already in the market that the Postal Service regulates.

We thank the Commission for this opportunity to provide our reply comments and look forward to the institution of these new rules, as slightly amended based on comments received.

Respectfully submitted

s/ David P. Hendel

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